A **FARAH ABDUL MALIK**

v.

UNZA HOLDINGS SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: S2-22-370-2007]
13 AUGUST 2010

C ***CIVIL PROCEDURE:*** *Striking out - Want of prosecution - Remaining defendants applying to strike out plaintiff's suit after 1st defendant's successful striking out application - Plaintiff claiming delay due to energy and attention focussed on resisting 1st defendant's striking out application - Whether delay justified - Whether remaining defendant's*
D *prejudiced - Whether justice of case overrides technical non-compliance - Rules of the High Court 1980, O. 1A, 2, 25 r. 1(4), 34 r. 2(2)*

The plaintiff accepted the 2nd defendant's invitation for a photography session following which her photographs were
E published in the 2nd defendant's magazine for an article relating to health issues in May 2006. In January 2007, the plaintiff discovered that her photograph was published again in the same magazine for an advertisement portraying her as a cover girl for a cosmetic product under the brand name 'Safi'. The plaintiff
F claimed that she did not receive any money for any endorsement or advertising contract either from the 2nd defendant or the owner of the Safi brand. That led to her suit against the defendants on 10 April 2007. At that material time, on conducting her own investigations, the plaintiff honestly believed the 1st
G defendant was the owner of the Safi brand. It transpired later that the 1st defendant was not the owner of the Safi brand and the 1st defendant's application to strike out the plaintiff's claim against it on that ground was allowed with costs on 11 April 2008.

H On 11 December 2009, the present application was filed by the remaining defendants (2nd to 5th defendants) to strike out the plaintiff's claim against them for want of prosecution under O. 25 r. 1(4) and/or O. 34 r. 2(2) and/or the inherent powers of the court under O. 92 r. 4 of the Rules of the High Court 1980
I ('RHC'). The plaintiff submitted that the delay for want of prosecution was due to her energy and attention being focussed on resisting the 1st defendant's application to strike out her claim.

Held (dismissing the defendants' application):

(1) The plaintiff's explanation for the delay was accepted, in that her energy and attention was focussed on resisting the 1st defendant's striking out application from September 2007 to April 2008 and thereafter from August 2008 when the bill of cost was filed by the 1st defendant for a hefty sum of RM50,000 up to the hearing of the said bill on 30 December 2009. There was also no notice given by the remaining defendants to apply to strike out the suit for want of prosecution until the service of the application filed on 11 December 2009. (para 17)

(2) There was little merit in the defendants' contention that they had been seriously prejudiced by the delay in setting down the matter for trial. The defendants' defence was a mere denial of the plaintiff's claim and basically a shifting of the blame to an employee of the 2nd defendant whom they claim to have dismissed on the ground of sabotage. (para 19)

(3) There was no inordinate delay and deliberate breach by the plaintiff. Any prejudice suffered by the defendants could be compensated by costs. The overall justice of the case had to be considered and so too the fact that a single individual litigant was prosecuting her claim against big corporations whom had better resources and resilience in such disputes over her intellectual property rights as a model. There was no reason to deprive and deny the plaintiff her day in court merely because of some delay caused by her solicitors. Further, the present case filed in April 2007 was amongst the many cases filed in 2007 that had yet to be heard by the courts in civil division as the focus was to clear the pre-2005 cases. That apart, O. 1A RHC provided that regard should be given to the justice of the particular case and not only to the technical non-compliance of the rules. Failure to comply with the requirements of the rules should not nullify the proceedings (O. 2 r. 1(1) RHC) and regard must be given to whether or not a substantial miscarriage of justice was occasioned (O. 2 r. 3 RHC). In the circumstances, the default on the part of the plaintiff was not intentional and contumelious or the delay inordinate or inexcusable. (paras 20-22)

[Cost of RM1,500 to be paid to each of the four remaining defendants amounting to RM6,000 before next hearing date.]

A **Case(s) referred to:**

TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin [1999]] 4 CLJ 373 FC ***(refd)***

United Malayan Banking Corporation Berhad v. Palm And Vegetable Oils (M) Sdn Bhd & 3 Ors [1994] 3 CLJ 144 SC ***(refd)***

B **Legislation referred to:**

Rules of the High Court 1980, O. 1A, O. 2 rr. 1(1), 3, O. 25 r. 1(1), (4), O. 34 r. 2(2), O. 92 r. 4

For the respondent/plaintiff - Azhar Aman Ali; M/s Aman-Yunos

For the applicants/defendants - Zuwita Kamaruzaman; M/s Noor Aman

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Reported by Melanie Murthy

JUDGMENT

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Lee Swee Seng JC

Prologue

E **[1]** Going for trial is not for the faint-hearted. It requires focus and fortitude otherwise frustration can easily set in. What more when you are a sole individual plaintiff suing corporations and their agents. Whilst the Rules of the High Court 1980 have been drafted to take away the element of ambush yet in preparing for trial there is still room for strategising and perhaps even a 'sneak-attack' and a 'surprise and shock' element. Some have called it the 'Justice Game' with all the elements of careful preparation in the pleadings, preliminary onslaughts in the various interlocutory applications and the final plunge in the pre-trial case management and trial preparation.

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Parties

[2] The plaintiff is no stranger to the world of fashion and modeling. Her photos have adorned the pages and print of many a publication. In March 2006, the plaintiff and her friends were invited by the 2nd defendant to attend and participate in a photography session at the 2nd defendant's premises. The 2nd defendant is the publisher of a women's magazine called 'Majalah Nona' ('the said magazine').

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[3] Before the photo-shoot, the 2nd defendant (through its agents) told the plaintiff that the photographs to be taken would be used solely in conjunction with an article to be written in the said magazine. The plaintiff was also interviewed by the 2nd defendant's writer for the article.

[4] The article discussed health issues pertinent to women 'over 30' though some would say age is only a number and if you don't mind it doesn't matter! The plaintiff was the subject of the interview in the article. She was 31 years old then. The article was published in the May 2006 issue of Majalah Nona.

[5] After the photography and the interview session, the plaintiff did not hear from the 2nd defendant after the publication of the article in the May issue of Majalah Nona.

Problem

[6] The problem that led to this litigation started when one day, to her utter shock and amazement, she saw her photograph and her name appearing again in the said magazine in the January 2007 issue. This time it was for an advertisement where she was portrayed as a 'cover girl' for a cosmetic product under the brand name of 'Safi'. The plaintiff recognizes that her photograph used in the advertisement was from the photo session for the May 2006 article.

[7] The plaintiff was dismayed, distraught and disturbed that such a thing should happen at all. She felt that she had been manipulated. Neither the 2nd defendant nor any third party had ever asked her for permission to use her photographs and her identity for any other purposes. Certainly not to endorse a cosmetic product that she had never consented to! The plaintiff never had any endorsement contract with the manufacturer of the Safi product. The plaintiff had never received any money for any endorsement or advertising contract either from the 2nd defendant or the manufacturer of the Safi products.

[8] The plaintiff also felt that there had been a conspiracy between the 2nd defendant and the manufacturer of the Safi product against her in the sense of reckless disregard of whether the plaintiff's consent had first been obtained. Further as there had not been any endorsement or advertising contract signed, the 2nd defendant and/or the manufacturer of the Safi product were unjustly enriched by virtue of not having to incur endorsement or advertising costs.

[9] To compound the problem, the plaintiff was in the dark as to who was responsible for manufacturing of the Safi products. The advertisement in the January 2007 issue of the said magazine did not disclose any information on the manufacturer. The plaintiff had to do her own private investigation.

[10] In the course of her investigation, she discovered an entity called Unza Holdings Sdn Bhd ('Unza Holdings'). The plaintiff honestly believed that Unza Holdings was the owner of the Safi brand.

[11] The plaintiff wrote a letter of demand against the 2nd defendant and Unza Holdings and subsequently commenced an action against them on 10 April 2007 for breach of confidence/ trust; conspiracy to defraud and unjust enrichment. Defences of the 2nd to 5th defendants were filed on 29 August 2007 and that of the 1st defendant on 13 September 2007.

Prayers

[12] The 1st defendant filed an application on 12 September 2007 to strike out the suit on the basis that they were not the owner of the Safi brand. Pleadings were deemed closed on 12 September 2007. Several affidavits were filed and served on each other. The plaintiff conducted further investigation to determine whether she had sued the correct company Unza Holdings as the 1st defendant. Information received from the Ministry of Health Malaysia revealed that Unza (Malaysia) Sdn Bhd was the owner of the Safi brand and not the 1st defendant. It was then that the plaintiff realized that she had made a mistake. It was however too late to withdraw her suit against the 1st defendant. Finally the court on 11 April 2008 struck off the plaintiff's claim against the 1st defendant with costs.

[13] On 11 December 2009 the remaining defendants file their application to dismiss the writ and statement of claim dated 10 April 2007 filed pursuant to O. 25 r. 1(4) and/or O. 34 r. 2(2) and/or the inherent powers of the Court under O. 92 r. 4 of the Rules of the High Court 1980 ('RHC').

Principles

[14] Some key dates set out in chronological order are as follows:

10 April 2007	–	Plaintiff filed writ and statement of claim
29 August 2007	–	2nd to 5th defendants filed their defence
12 September 2007	–	1st defendant filed application to strike out writ and statement of claim
13 September 2007	–	1st defendant filed defence
11 April 2008	–	Court allowed the 1st defendant's application to strike out writ and statement of claim
27 August 2008	–	The 1st defendant filed their bill of costs.
11 December 2009	–	The remaining defendants filed their application to strike out writ and statement of claim
30 December 2009	–	The 1st defendant's bill of cost fixed for hearing
18 January 2010	–	The court gave its decision on the taxed bill of cost
3 February 2010	–	The plaintiff filed notice to attend pre-trial Case Management (Form 63)
9 February 2010	–	The defendant's application was fixed for hearing.

[15] Pursuant To O. 25 r. 1(1) RHC:

> ... the Plaintiff must within 1 month after the pleadings in the action are deemed to be closed, take out a summons in Form 46 (in these rules referred to as a summons for directions).

[16] In *TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin* [1999]] 4 CLJ 373 at p. 386, the Federal Court speaking through his Lordship Chong Siew Fai, CJ (Sabah& Sarawak) said:

A The principles of law on dismissal of actions for want of prosecution may be found in the following passage in the judgment of Lord Diplock in *Birkett v. James* [1978] AC 297 at 318:

B The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a C substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

D The above principles have been adopted by our courts in Malaysia see eg, *Vasudevan v. Damodaran* [1974] 1 LNS 185; *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1981] CLJ 292; *R Rajasingam v. Balwant Singh Purba* [1996] 3 CLJ 222; [1996] 2 MLJ 549 CA; *Arab-Malaysia Finance Bhd v. Malacca Development Corp. Sdn. Bhd. & Ors* [1997] 3 CLJ 51; [1997] 5 MLJ 685; *Lee Boon Tin v. E Trustees of Leong San Tong Khoo Kongsi* [1996] 5 MLJ 601; *Balwant Singh v. R Rajasingam* [1995] 4 CLJ 491; [1996] 4 MLJ 404; *KS Chua & Co. v. Chui Miang Chew* [1996] 2 CLJ 676; [1995] 4 MLJ 436; *Negara Properties Sdn. Bhd v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923; [1995] 2 MLJ 185; *Wong Sing Meng* F *v. Wong Sam Moi* [1991] 2 CLJ 1223; [1991] 2 MLJ 277; *Datuk Samy Vellu v. Karpal Singh* [1990] 2 CLJ 4.

[17] I agree with the counsel for the plaintiff with respect to his explanation for the delay in that their energy and attention was G focused on resisting the 1st defendant's application to strike out the writ and statement of claim against them from September 2007 to April 2008 and thereafter from August 2008 when the bill of cost was filed by the 1st defendant claiming a hefty sum of about RM50,000 up to hearing of the bill of cost on 30 December 2009. There was no notice given by the remaining H defendants to apply to strike out the suit for want of prosecution until the service of the application filed on 11 December 2009. unlike the case of TM Feroz Khan & Ors and even then the Federal Court held that the default had not been intentional and I contumelious or that the delay had been inordinate and inexcusable.

[18] Guidance can be had on the meaning of 'serious prejudice' by reference to the Supreme Court case of *United Malayan Banking Corporation Berhad v. Palm And Vegetable Oils (M) Sdn. Bhd. & Ors* [1994] 3 CLJ 144 at p. 149, where his Lordship Mohamed Dzaiddin SCJ (as he then was) said:

> On the question of prejudice which must be "serious", we would rely on the passage in the Supreme Court Practice 1993, *supra*, (p. 472):
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> This is a matter of fact and degree and has been discussed in *Allen v. McAlpine* [1968] 2 QB 229; [1968] 1 All ER 543, CA and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but is of much less importance in a heavy, well-documented commercial action (*National Insurance Guarantee Corp. Ltd. v. Robert Bradford & Co. Ltd.* [1970] 114 SJ 436, CA). But prejudice is not limited to matters affecting proof; a defendant, particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Biss v. Lambeth, Southwark and Lewisham Health Authority (Teaching)* [1978] 1 WLR 382; [1978] 2 All ER 125, CA)
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> Considering the grounds of judgment, it would appear to us that his Lordship has misapplied the above principles, particularly on the question of "serious" prejudice, to the given facts of the case. His Lordship relied on para 5(1) of the third respondent's affidavit alleging that nine years had passed by since the filing of the writ and, aside from important and key witnesses having died, the control of the plaintiff bank itself has changed hands a few times. It appears to us that since this affidavit was filed, there has been no further evidence to show who are the key witnesses of the respondents who have since died. As pointed out by Encik Naban, both Dato' K.K. Sharma, who incidentally is the third respondent and the alter ego of the respondent company, and Dato' Mohd Salleh Yusoff are still around. Next, his Lordship seemed to have rejected the contention that the delay was caused by the negotiations between the parties. Although, admittedly, they were on "without prejudice" basis, nevertheless it was a factor to be considered in favour of the appellant. Moreover, the negotiations were, to some extent, being encouraged by the respondents which, in the words of Encik Naban, the appellant

was "in the belief that an out-of-Court settlement would be reached" (*Sel-Rex Corporation v. PMD Chemicals Ltd* [1971] RPC 297 at p. 300). Thirdly, the learned Judge overlooked the fact that the respondents themselves have yet to file their list of documents within the stipulated period under the order of the Senior Assistant Registrar in the summons for direction. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay. (*Austin Securities Ltd v. Northgate and English Stores Ltd* [1969] 2 All ER 753 CA). Fourthly, looking at the pleadings, we tend to agree with Counsel that the entire case of the appellant would depend on the documents, such as, loan agreements, letters of guarantee, title deeds and sale and purchase agreements. According to Counsel, they are still in existence *(National Insurance Guarantee Corp. Ltd. v. Robert Bradford & Co. Ltd., supra)*. Having regard to the above observations and bearing in mind that the prejudice alleged must be shown to be "serious", we are satisfied that, on the facts and circumstances of this case, no serious prejudice to the respondents has been made out. On a whole, we are of the view that the delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

[19] The defendants contended that they have been seriously prejudiced because of the delay in setting down the matter for trial. I find little merit in this as the defendants' defence is a mere denial of the plaintiff's claim and basically shifting the blame to an employee of the 2nd defendant one Farah Sheiakha binti Abd Wahid whom they claimed had sabotaged them and that following a domestic enquiry held the said employee was dismissed on 8 January 2007. The defendants alluded to the fact that it would be difficult to locate the dismissed employee as a key witness but then one must admit that in any event a dismissed employee is not going to be very cooperative in terms of his availability as a witness anyway. Whatever witnesses that the defendants are minded to call, they can prepare witness statements and even statutory declarations for the witnesses to sign them if at all the fear of fading memory and recollection of the photo-shoot event is more real than imaginary.

[20] This is not a case of inordinate delay and deliberate breach of the RHC. Should there be any prejudice suffered by the defendants, it is not something that cannot be compensated by cost. The court has to look at the overall justice of the case and to the fact of a single individual litigant prosecuting her claim against big corporations who have better resources and resilience in such disputes over the intellectual property rights of a model

for example. There is no reason to deprive and deny the plaintiff her day in court merely because there has been some delay caused by her solicitors. In any event this is a case that was filed in April 2007 and many cases filed in 2007 have not been heard by the courts in civil division yet as the focus is to clear the pre-2005 cases. I am reminded of O. 1A RHC wherein it is stated that in administering any of the rules herein the court or judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules.

[21] I am also mindful of O. 2 r. 1(1) RHC where if there has been a failure to comply with the requirements of the rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings therein. The court shall also have regard to whether or not substantial miscarriage of justice has been occasioned. See O. 2 r. 3 RHC.

Pronouncement

[22] After regard to all the circumstances of this case and to the fact that the default on the part of the plaintiff cannot be said to be intentional and contumelious or that the delay is inordinate or inexcusable I dismissed the defendants' application but ordered that cost of RM1,500 be paid to each of the four remaining defendants amounting to RM6,000 all herein before the next hearing date. To obviate and any delay I also fixed trial of this matter on 12 October 2010 and 13 October 2010. The plaintiff had on 3 February 2010 filed Form 63 RHC for Pre-Trial Case management. That has now been fixed on 23 August 2010. Parties are hereby directed to file their bundle of pleadings, bundle of documents, statement of agreed facts and issues to be tried by the said date and witnesses' statements filed and exchanged before the trial date

Postscript

[23] Time frames and deadlines in the RHC are designed to discipline us to diligently prosecute our claims in court. Delay can often be costly in cost that one has to pay and in serious unexplained delay where one or both parties have gone to sleep after starting a case, they might be shocked to have been awaken from their stupor only to find their case struck off for want of prosecution.